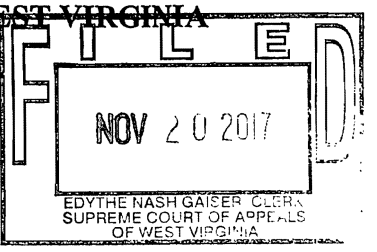
IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA



JULIAN S. ARCHULETA,
Defendant below/Petitioner,

vs. **Appeal No. 17-0528**

(Appeal from the Circuit Court of Berkeley County, Civil Action No. 15-C-407)

US LIENS, LLC,
Plaintiff below/Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In reply, Petitioner, Juliann S. Archuleta (hereinafter Archuleta), argues as follows:

A. The Argued Attempts at Personal Service were Untimely and Fall Short of Satisfying Due Process.

Respondent summarily argues that "US Liens attempted to personally serve Archuleta". Respondents Brief, p. 2. In reality, U. S. Liens never retained a private process server and knowingly halted service by the sheriff's department. *App. I, p* 357. As demonstrated by the notation made on the return, service was unsuccessful, never attempted following the return of the certified mail unclaimed, and nevertheless, "requested to be returned" *App. I. pp.* 357, 347. US Liens' decision to demand the tax deed without personal process being completed upon Archuleta was confirmed by the West Virginia State Auditors office email of March 20, 2015. *App. I, p.* 360.

When US Liens did not receive a tax sale deed, it conveniently picked up the telephone and made an inquiry of the state auditor's office. *App. II, p.* 45 at 8-11. Prior to that, US Liens made no telephone call to the state auditor or anyone else to inquire about service of notice to redeem upon the owner, Archuleta. *App. II, p.* 13 at 6-18. The sole member of US Liens testified that any knowledge it acquired regarding its failure to give notice to Archuleta by certified mail occurred after its receipt of the tax deed. *App. II, p.* 27 at 7-19.

Even now, US Liens can not identify the dates, times, place, manner or steps taken in connection with any attempted service. US Liens assumes someone from the Sheriff's office attempted service. *App. II, p.* 41 at 8-10. US Liens does not know the time of day or night a deputy may have gone to the residence. *App. II, p.* 41 at 11-12. US Liens does not know what was observed or done during the one or two visits to the property that may have been made by a deputy in January or February. *App. II, p.* 41 at 16-20. US Liens also admits it never tried to find out this information. *App. II, p.* 41 at 21-22.

Similarly, US Liens is in no position to ignore the facts of record and speculate that the additional steps which could have been undertaken by it or a private process server would have been futile. The unrebutted facts support a different conclusion. The posting of the property or speaking to the next door neighbor would have certainly resulted in actual notice to Archuleta. Archuleta's neighbors were home and generally knew of her whereabouts and a person was visiting the property daily to tend to Archuleta's pets. *App. III, pp.* 62 at 6-8 and 75 at 24-76 at 2.

B. Failure to Join an Indispensable Party Under Rule 19 was Never Raised Below

US Liens failed to raise as a defense in the trial court the failure to join an indispensable party under Rule 19. Such an issue or claim is not a constitutional one and is considered waived. See. *Roberts v. Stevens Clinic Hosp.,* 176 W.Va. 492, 499, 345 S.E.2d 791, 798–99 (1986); *Bell v. West,* 168 W.Va. 391, 397, 284 S.E.2d 885, 888 (1981); *Builders' Serv. & Supply Co. v. Dempsey,* 224 W. Va. 80, 84, 680 S.E.2d 95, 99 (2009).

Moreover, the presence or absence of the West Virginia Auditor is irrelevant to the determination of whether Archuleta received the due process and notice which the statutes of this state and the Constitution afford her. Arguing that the notice should have or could have been

sent by the West Virginia Auditor does not absolve or eliminate the fact that such notice was not given and that as a matter of law the failure to give that notice constitutes a failure to afford a property owner due process. In O'Neal v. Wisen, No. 5:16-CV-08597, 2017 WL 3274437, at *2 (S.D.W. Va. Aug. 1, 2017), the United States District Court for the Southern District of West Virginia was presented a case where no notice addressed to "occupant" was sent to the street address of the property. It found that the absence of the statutory mandated mailing addressed to "occupant", the issuance of a tax deed, was in and of itself, a failure of due process. Similarly, that court found that the tax lien purchaser who did not direct a notice to the "occupant" of the property and took no additional measures to provide notice when the initial mailings were returned constitutes a due process violation. *Id.* Those facts mirror the facts at hand and the reasoning of the *Wisen* court is equally applicable here. The *Wisen* court reasoned as follows:

> [Tax lien purchaser] is likewise not entitled to summary judgement. It is undisputed that he did not direct a notice to the "occupant" of the property and took no additional measures to provide notice when the initial mailings were returned. ... He argues that the [property owner] did have notice. However, notice of a tax delinquency or of taxes due does not substitute for notice of the right to redeem following a tax sale, and the lack of diligence on the property owner does not justify a lack of notice by the purchaser. As Judge Irene Keeley noted in a similar case in the Northern District of West Virginia, "[p]erhaps the simplest, most efficient, and most direct way of providing notice ... would have been to do exactly what [the purchaser] did once it had acquired the deed to the property – go to the property and knock on the door or post notice". Kelber, LLC v. WVT, LLC, 213 Ep. Supp. 3d 789, 804 (N.D. W.Va. 2016).

O'Neal v. Wisen, No. 5:16-CV-08597, 2017 WL 3274437, at *2 (S.D.W. Va. Aug. 1, 2017)

C. Archuleta's Conduct is Not the Standard by Which Due Process is Measured.

US Liens attempt to deflect and excuse its failure to give notice by pointing to what Archuleta could have done or to the fact that someone (not Archuleta) signed for the notice of tax sale in 2013 is misplaced and has already been dismissed by courts in West Virginia. As

quoted above, Justice Irene Berger in the *Wisen* decision: "...[N]otice of a tax delinquency or of taxes due does not substitute for notice of the right to redeem following a tax sale, and the lack of diligence on the property owner does not justify a lack of notice by the purchaser." *O'Neal v. Wisen*, No. 5:16-CV-08597, 2017 WL 3274437, at *2 (S.D.W. Va. Aug. 1, 2017).

It is both alarming and disingenuous that US Liens argues that the failure to meet the due process requirements of West Virginia's controlling statute and the holding of the United States Supreme Court in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L.Ed.2d 415 (2006), and its prodigy is the fault of Archuleta or a mere "technical oversight". Respondent's Brief, p. 5.

D. The Expert Agreed that US Liens Failed to Exercise Due Diligence

Respondents go to great effort to include testimony of Archuleta's expert witness, D. Frank Hill, III, Esq. Not surprisingly however, it fails to disclose that testimony surrounding the opinion for which Mr. Hill was actually identified: US Liens failed to exercise due diligence. That portion of Mr. Hill's deposition testimony reads:

> "Q. Okay. So just so I understand, unrelated to the occupant opinion, as it relates to the service of process opinion, why do you believe that service – you only know what you know that they did. Why do you believe that it was ineffective?
>
> A. Well, for one thing, it didn't work.
>
> Q. "It didn't work." What do you mean when you say that?
>
> A. I mean, the sheriff didn't make contact with someone in the house –

App. IV, pp. 94 at 25- 95 at 9.

> Q. Right.
>
> A. So the private person would camp out, and I said, "Listen, if it takes you three days, I want you to find this person and do it."
>
> Q. Okay.

...

A. Also, the private process server is going to take my instructions for more than a deputy sheriff is going to because a deputy sheriff is not going to take anybody's instructions.

...

I have been able – through a private server, I've been successful of getting service perfected because the guy would camp out, as I said, or he could make contact with a neighbor perhaps or see somebody come and go or see a car that's there, post it on a car, put it on a windshield, put it on a front door. I've done that.

I mean, I had a guy I'd give an envelope, a Kraft envelope, or whatever it is on the inside, and I said, "Put the damn thing on the front door with a piece of tape. Take a picture of it, put that on the certificate."

So if you want to, there is a lot of things you can do with a private person that you cannot get done with a sheriff. ...

App. IV, pp. 95 at 22-96 at 25.

Q. Okay. So that your fifth opinion where you state, "Due diligence was not exercised," I think you stated – well, a couple minutes ago, that you believe that encompassed more than just not relating to the actual service of process and perhaps more than the "occupant" issue.

Is there anything that you have encompassed in the due diligence that you believe –

A. Well –

Q. – that Mr. Gupta or US Liens did not do that we have not talked about?

A. Well, the problem with these cases is that they are so subjective as to the extent to which a person should go to assure themselves to the extent possible; and, again, as I said earlier, a lot of this is balanced on how firmly the tax lien purchaser wants to acquire the property. This method of service through the sheriff, as I said earlier, was perfunctory.

If the purchaser, my client, as an example, would have contact the Secretary of State – or the state auditor and looked at the screen of all this documentation and seen where the certified letters were ineffectual, then, yeah, I could tell the client, "I think you ought to go ahead and do this, if you really want to guarantee this transaction. If you're just in it for the 12 percent or whatever you're going to get, then don't worry about it. You're going to get your money back. It's going to be – you're going to get – she's going to refund the money. You're going to get your refund, and you're in it for the money; but it you really want to acquire the title and you're aware that the certified mail has been ineffectual, for whatever

reason, and you really want to go to the mat with this, you better do this, this, and this," ...

App IV, pp. 99 at 12-100 at 24.

WHEREFORE, for the reasons above and those previously set forth in the Petition for Appeal, Juliann S. Archuleta requests that this court reverse the order granting Plaintiff's cross motion for summary judgment and finding that Juliann S. Archuleta is entitled to judgment and an order setting aside the tax sale deed as a matter of law.

Respectfully submitted.

Petitioner,
Juliann S. Archuleta,
by her counsel,

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CERTIFICATE OF SERVICE

I, Tammy M. McWilliams, counsel for the Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing Petitioner's Brief upon counsel for the Respondent at the following address, by U.S. Mail, first class, postage prepaid and electronic transmission, this 15th day of November, 2017, to-wit:

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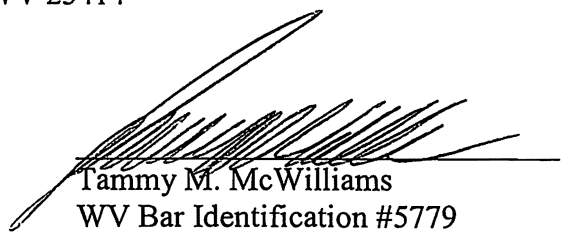

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